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No. 14-723

IN THE
Supreme Court of the United States

ROBERT MONTANILE,
Petitioner,
v.

BOARD OF TRUSTEES OF THE NATIONAL ELEVATOR INDUSTRY HEALTH BENEFIT PLAN,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR RESPONDENT

JOHN D. KOLB
GIBSON & SHARPS, PSC
9420 Bunsen Parkway
Suite 250
Louisville, KY 40220

NEAL KUMAR KATYAL
Counsel of Record
JESSICA L. ELLSWORTH
MARY HELEN WIMBERLY
SEAN MAROTTA
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
neal.katyal@hoganlovells.com
(202) 637-5600

Counsel for Respondent

QUESTION PRESENTED

Whether a beneficiary of a benefit plan governed by the Employee Retirement and Income Security Act of 1974 can defeat enforcement of the plan's valid equitable lien by agreement—after the lien attaches—by dissipating the fund subject to the lien.

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BRIEF FOR RESPONDENT

INTRODUCTION

This case raises an important question of federal law that has divided the courts of appeals: Can a beneficiary of a health-benefit plan governed by the Employee Retirement and Income Security Act of 1974 (ERISA) defeat enforcement of the plan's valid equitable lien by agreement by spending the fund subject to the lien? The existence of the deep circuit split over this question is undisputed; indeed, the Solicitor General recognized the split in his invitation brief in *Thurber* v. *Aetna Life Insurance Co.*, No. 13-130. The importance of the question presented is likewise undisputed; its resolution will affect the affordability of plans that are responsible for paying benefits to over 132 *million* people. *See* William Pierron & Paul Fronstin, Employee Benefit Research

Inst., *ERISA Pre-emption: Implications for Health Reform and Coverage* 1 (Feb. 2008). Respondent therefore agrees that now is the time for this Court to grant review and resolve the question.

The parties part ways, however, when it comes to how the question should be resolved. The Eleventh Circuit got this case exactly right: a plan beneficiary who accepts medical-expense payments from an ERISA plan that requires the beneficiary to reimburse the plan out of any third-party recovery cannot avoid his side of the bargain by spending down and dissipating that recovery. A contrary finding would upend the basic assumptions underlying ERISA plans and the careful balance struck by the reimbursement provisions in those plans.

The arrangement struck by plans and beneficiaries is mutually beneficial. On one side of the balance, a covered employee injured by the fault of another is guaranteed that his medical bills will be paid, free from the uncertainty and delay that often accompanies suing an underinsured or judgment-proof tortfeasor. But, on the other side, health plans reasonably do not want to spend their limited resources paying medical bills that could, and should, have been paid by the actual wrongdoer. So ERISA plans often include a reimbursement clause offering a tradeoff: the plan will pay the beneficiary's medical bills upfront, without regard to fault, so long as the beneficiary agrees to use any tort recovery he later obtains to reimburse the plan. The clause ensures a more-equitable allocation of plan resources and lower rates for all beneficiaries.

Beneficiaries have long resisted reimbursement provisions, decrying them as unfair in their particu-

lar circumstances. But time and again, this Court has held that if a reimbursement provision is properly drafted, it may be enforced under ERISA's Section 502(a)(3), which allows a plan fiduciary to seek "appropriate equitable relief" to enforce the plan's terms. 29 U.S.C. § 1132(a)(3)(B).

In *Sereboff* v. *Mid Atlantic Medical Services, Inc.*, 547 U.S. 356 (2006), the Court held that a plan's suit to enforce a reimbursement clause seeks equitable relief because the action is akin to one to enforce an "equitable lien by agreement"—a traditional equitable remedy. And in *US Airways, Inc.* v. *McCutchen*, 133 S. Ct. 1537 (2013), the Court rejected a beneficiary's claim that a plan's recovery under a reimbursement provision should be subject to various equitable offsets. A court enforcing a valid reimbursement provision, the Court held, applies the terms of the clause as written.

Some beneficiaries nonetheless continue to resist repayment. This case involves the latest such technique: Claiming that the plan cannot enforce its lien because the beneficiary has already spent the money he agreed to repay. This strategy has had some success. The Ninth Circuit ruled in favor of a beneficiary who had done just that. And the Eighth Circuit ruled in favor of a beneficiary's attorney after concluding that a claim for repayment of monies no longer held sought legal, not equitable, relief. The Eleventh Circuit below, however, joined the majority view of five of its sister circuits and recognized that later dissipation is irrelevant under *Sereboff* so long as the beneficiary possessed the sought-after funds at some point.

Both plans and beneficiaries have sought this Court's review of this acknowledged split in the past, but vehicle problems appear to have prevented the Court from doing so. This case is an appropriate vehicle to address the question once and for all. The judgment below is final, and Petitioner concedes that his plan's reimbursement clause is valid and enforceable but for his claim of dissipation. And though the Eleventh Circuit's holding is manifestly correct, the contrary rule lingering in other circuits creates uncertainty that harms plans and beneficiaries alike.

The Court should grant certiorari.

COUNTERSTATEMENT

1. ERISA comprehensively regulates most private-sector employee benefit plans that provide benefits in the event of sickness, accident, disability, or death. *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U.S. 41, 44 (1987). The statute is designed to facilitate the "fair and prompt enforcement of rights" created under those plans. *Aetna Health Inc.* v. *Davila*, 542 U.S. 200, 215 (2004). ERISA does not require employers to offer a benefit plan in the first place, nor does it "mandate what kind of benefits employers must provide if they choose to have such a plan." *Lockheed Corp.* v. *Spink*, 517 U.S. 882, 887 (1996). But once an employer chooses to offer a benefit plan, the statute's regulatory regime kicks in: ERISA requires disclosure of certain information; sets standards for plan administration and asset management; and includes "carefully integrated civil enforcement provisions" available to plan participants, plan fiduciaries, and the Secretary of Labor. *Massachusetts Mut. Life Ins.*

Co. v. *Russell*, 473 U.S. 134, 146 (1985); *see* 29 U.S.C. §§ 1001(b), 1132(a).

Section 502 of ERISA contains the statute's civil enforcement provisions. *See* 29 U.S.C. § 1132. Subsection (a)(1) authorizes plan participants to file civil actions seeking the usual panoply of legal remedies. Plan fiduciaries have more limited options, however. They must resort to subsection (a)(3), which provides that a fiduciary may seek an injunction or "other appropriate equitable relief" to enforce the terms of a written benefit plan or the statute itself. 29 U.S.C. § 1132(a)(3)(B). This Court has construed Section 502(a)(3) to authorize only "those categories of relief that were typically available in equity" during the days of the divided bench. *Mertens* v. *Hewitt Assocs.*, 508 U.S. 248, 255-256 (1993) (emphasis omitted).

2. Petitioner Robert Montanile was a beneficiary of a welfare benefit plan administered by the Respondent, the Board of Trustees of the National Elevator Industry Health Benefit Plan. Pet. App. 2a-3a. When Montanile was injured in a car accident, the Plan paid his initial medical expenses, totaling $121,044.02. *Id.* at 6a.

The Plan is governed by ERISA, *id.* at 3a, and, like many plans, includes provisions addressing the Plan's rights if it pays for medical expenses caused by a third party, *id.* at 5a. The Plan states that a beneficiary's "[a]cceptance of benefits from the Plan for an injury or illness * * * constitutes an agreement that any amounts recovered from another party * * * will promptly be applied first to reimburse the Plan in full for benefits advanced by the Plan due to the injury or illness." *Id.* at 5a-6a. The Plan further

provides that the Plan is entitled to reimbursement for all amounts paid, "without reduction for attorneys' fees, costs, [or] expenses." *Id.* at 6a.

In other words, by accepting benefits from the Plan following his accident, Montanile agreed to reimburse the Plan on a first-dollar basis from any judgment or settlement he obtained. *See* Pet. 11 (agreeing that the Plan's reimbursement provision is valid). Indeed, Montanile signed an agreement expressly acknowledging the Plan's reimbursement rights before the Plan paid his medical expenses. *See* D. Ct. Dkt. No. 36-5 at 1.

Montanile sued the drunk driver at fault in his accident and eventually obtained a $500,000 settlement. Pet. App. 6a. The Plan asked Montanile to honor his reimbursement agreement, but Montanile refused. *Id.* at 7a. Montanile instead asked the Plan to compromise its lien, even though over $235,000 remained after Montanile paid his attorneys and their out-of-pocket expenses. *See id.* at 6a-7a.

After a series of proposals and counter-proposals, the Plan and Montanile reached an impasse. *See* D. Ct. Dkt. No. 35-2 at 3. Rather than satisfy the Plan's lien or seek a declaratory judgment as to the Plan's right to the funds, however, Montanile's counsel released the money to him, less their fee. *Id.* Montanile says that he then spent the money. Pet. App. 36a.

2. The Plan sued Montanile in federal court, invoking Section 502(a)(3)'s civil remedy to enforce the Plan's reimbursement provision. Pet. App. 7a. Applying this Court's decisions in *Sereboff* and *McCutchen*, the District Court held that Montanile's agreement to repay the Plan any amount recovered

from another party gave the Plan an equitable lien by agreement over the settlement funds—a form of "appropriate equitable relief" under Section 502(a)(3). Pet. App. 25a-30a. Montanile nonetheless maintained that the Plan could not enforce its lien because he had spent the settlement funds. *Id.* at 35a.

The District Court disagreed and granted the Plan summary judgment. *Id.* at 35a-42a. "Following the majority view," the District Court "conclude[d] that any dissipation of the settlement funds by [Montanile] is immaterial" to the Plan's right of recovery. *Id.* at 41a. So long as Montanile had possessed the funds at some point—and he had—Montanile could not evade enforcement of the Plan's lien by spending the money he had promised to turn over. *Id.* at 42a.

3. The Eleventh Circuit affirmed, relying on its recent holding in *AirTran Airways, Inc.* v. *Elem*, 767 F.3d 1192 (11th Cir. 2014). Pet. App. 10a-11a.

In *Elem*, the Eleventh Circuit rejected a dissipation argument identical to Montanile's. The court of appeals held that "[i]t matters not whether the settlement funds have since been disbursed or commingled with other funds." *Id.* at 53a. Rather, "[a]s soon as the settlement fund was identified, the plan imposed an equitable lien over that fund even thought it was in the hands of the beneficiaries." *Id.* at 54a. And the " '[p]roperty to which the lien attached may be converted into other property without affecting the efficacy of the lien.' " *Id.* (quoting *Funk* v. *CIGNA Grp. Ins.*, 648 F.3d 182, 194 (3d Cir. 2011) and citing *Central States, Se. & Sw. Areas Health & Welfare Fund* v. *Lewis*, 745 F.3d 283, 285 (7th Cir. 2014), *Thurber* v. *Aetna Life Ins. Co.*, 712 F.3d 654,

663-664 (2d Cir. 2013), *Cusson* v. *Liberty Life Assur. Co. of Boston*, 592 F.3d 215, 231 (1st Cir. 2010), *Longaberger Co.* v. *Kolt*, 586 F.3d 459, 466-467 (6th Cir. 2009), and *Popowski* v. *Parrott*, 461 F.3d 1367, 1374 n.8 (11th Cir. 2006)). As a result, even where a plan beneficiary "willfully refuse[s] to abide by the terms of" a plan, the beneficiary's "dereliction * * * could not destroy the lien that attached" before dissipation. *Id.* And that holding was fatal to Montanile's claims in his appeal. *Id.* at 10a-11a (noting Montanile's agreement that *Elem* foreclosed his dissipation argument).

This petition followed.

ARGUMENT

I. THERE IS AN ENTRENCHED SPLIT ON THE QUESTION PRESENTED, AND THIS CASE IS AN APPROPRIATE VEHICLE TO RESOLVE IT.

Although the parties disagree on the merits, they are aligned on two critical points. The Court should grant the petition to settle this important statutory question, and the petition is an appropriate vehicle for that review.

A. The Courts of Appeals Are Split On The Question Presented.

Respondent agrees with Montanile: there is a deep, acknowledged split among the courts of appeals on the question of whether a beneficiary can evade enforcement of an ERISA plan's otherwise-valid reimbursement clause by spending the funds the beneficiary promised to return to the plan. Pet. 15-17. The split is lopsidedly against Montanile, but it shows no sign of resolving. This Court should there-

fore grant the writ to bring uniformity to the courts of appeals. Sup. Ct. R. 10(a).

1. In *Sereboff*, the Court held that an ERISA fiduciary may enforce a reimbursement provision like the one in the Plan here because "it is indistinguishable from an action to enforce an equitable lien established by agreement." 547 U.S. at 368. An equitable lien by agreement, the Court explained, is different from a legal damages claim because the fiduciary seeks "to recover a particular fund from the defendant." *Id.* at 363. Thus, the fiduciary "could bring an action under § 502(a)(3) seeking the funds that its beneficiaries had promised to turn over." *McCutchen*, 133 S. Ct. at 1545.

In the wake of *Sereboff*, beneficiaries began to argue that their plans' reimbursement claims were unenforceable because the beneficiaries had spent the money they had promised to turn over. Because there was supposedly no longer "a particular fund" in their possession, the beneficiaries asserted, all that remained was a legal claim for damages that was not cognizable under Section 502(a)(3). *See, e.g.*, *Funk*, 648 F.3d at 194.

For years, the courts of appeals uniformly rejected these arguments. The Seventh Circuit explained that enforcement of a plan's lien under *Sereboff* "is not dependent on the ability to trace particular funds." *Gutta* v. *Standard Select Trust Ins. Plans*, 530 F.3d 614, 621 (7th Cir. 2008). Thus, the beneficiary's plan could bring its claim under Section 502(a)(3) "even if the benefits it paid [to the beneficiary] are not specifically traceable to [the beneficiary's] current assets because of commingling or dissipation." *Id.*

Other courts concurred. A year after the Seventh Circuit, the Sixth held that "an equitable lien by agreement does not require tracing or maintenance of a fund in order for equity to allow repayment." *Longaberger*, 586 F.3d at 466. The First Circuit similarly found that a plan's equitable lien by agreement was enforceable even though the plan "ha[d] not identified a specific account in which the funds are kept or proven that they are still in [the beneficiary's] possession." *Cusson*, 592 F.3d at 231. And the Third Circuit concluded that if "there was an equitable lien by agreement * * *, dissipation of the funds was immaterial." *Funk*, 648 F.3d at 194. The beneficiary, the Third Circuit held, "need not possess the property at the time relief is sought in order for the relief to be equitable—any post-agreement possession will suffice." *Id.* at 194 n.14.

2. As the petition recognizes, the Ninth Circuit split from its sister circuits in *Bilyeu* v. *Morgan Stanley Long Term Disability Plan*, 683 F.3d 1083 (9th Cir. 2012). *See* Pet. 16. The court acknowledged that "a number of circuits" had held that "a fiduciary can assert an equitable lien * * * even if the beneficiary no longer possesses the specifically identified funds." *Bilyeu*, 683 F.3d at 1094 (citing, among others, *Funk*, *Cusson*, *Longaberger*, and *Gutta*). But it nonetheless concluded that the other circuits had erred in holding that *Sereboff* allowed a fiduciary to enforce "an equitable lien against a beneficiary's general assets when specifically identified funds are no longer in a beneficiary's possession." *Id.* at 1095 (emphasis omitted).

In the Ninth Circuit's view, "the fiduciary must recover from specifically identified funds *in the beneficiary's possession*." *Id.* Thus, if a beneficiary

spends his settlement funds before a plan can file suit, the plan is simply out of luck. *Id.* at 1096-97. The plan in *Bilyeu* sought rehearing en banc and certiorari, but both were denied. *See* Pet. App. 59a, *First Unum Life Ins. Co.* v. *Bilyeu*, No. 12-526 (denying rehearing); 133 S. Ct. 1242 (2013) (denying certiorari).

The petition also notes that, after *Bilyeu*, the Eighth Circuit followed the Ninth Circuit's minority view. *See* Pet. 9, 15-16; *Treasurer, Trustees of Drury Indus., Inc. Health Care Plan & Trust* v. *Goding*, 692 F.3d 888 (8th Cir. 2012). In that case, the plan pursued relief against a beneficiary's counsel who had held settlement funds for the beneficiary. The Eighth Circuit concluded that where that counsel "no longer has any money to which [the plan] claims an interest," the plan's resulting claim is "legal, not equitable," and therefore not cognizable under Section 502(a)(3). *Goding*, 692 F.3d at 897. The plan in *Goding* also sought rehearing en banc and certiorari, but both were denied. Pet. App. 23a, *Treasurer Trustees of Drury Indus., Inc. Health Care Plan & Trust* v. *Goding*, No. 12-982 (denying rehearing); 133 S. Ct. 1644 (2013) (denying certiorari).

The next circuit to address the dissipation question, the Second, recited the established majority and minority views. *Thurber*, 712 F.3d at 663. The court then cast its lot with the majority, concluding that the rule "strikes the right balance" between plan and beneficiary. The court also explicitly "reject[ed] the Ninth Circuit's contrary view that [plans] may not reach specifically identified assets that have dissipated." *Id.* at 664. It explained that "[i]n the context of an equitable lien by agreement * * * all that matters is that the beneficiary did, at some point,

have possession and control of the specific portion of the particular fund sought by the insurer." *Id.*

This time, when the beneficiary sought certiorari, the Court called for the views of the Solicitor General. And the Solicitor General's brief in response confirmed that "the courts of appeals are divided on th[e] question" of whether an equitable lien by agreement may be enforced under Section 502(a)(3) when the beneficiary claims that he has spent the funds. Br. of the United States as Amicus Curiae, *Thurber* v. *Aetna Life Ins. Co.*, No. 13-130, at 6 (May 2014) (U.S. *Thurber* Br.). On the merits, the Solicitor General explained that, in the view of the United States, the Ninth Circuit's minority position was correct. *Id.* at 9-15. But the Solicitor General concluded that *Thurber* was a poor vehicle to address the question presented because it was not clear that the language of the plan even created a claim for equitable relief in the first place, *id.* at 15-20, and this Court denied the writ, 134 S. Ct. 2723 (2014).

3. The decision below, which follows directly from the Eleventh Circuit's application of *Elem*, raises the same issue that seven other circuits have analyzed and resolved. Pet. App. 53a-55a. The disagreement is sufficiently entrenched that only this Court can resolve it, and it is sufficiently important that the Court should do so now. Each circuit starting with *Bilyeu* acknowledged or was made aware of the split, but declined to rehear the issue *en banc* when asked to do so. The Court should step in to bring national uniformity on this important question of ERISA practice.

B. This Case Is An Appropriate Vehicle To Resolve This Important Question Of ERISA Practice.

The parties also agree that Montanile's petition is an appropriate vehicle to resolve this important question. Pet. 1, 18-22. Unlike previous cases, the validity of the Plan's equitable lien by agreement is uncontested in this Court. The question is therefore cleanly presented. And because both plans and beneficiaries desperately need clarification as to whether a beneficiary can evade enforcement of a plan's reimbursement provision by reneging on his promise, the petition should be granted.

1. Each of the prior petitions for certiorari since the split developed appear to have presented vehicle problems. *Bilyeu*, for instance, was in an interlocutory posture, 683 F.3d at 1096 (directing further proceedings on remand), which traditionally weighs against immediate certiorari review. *See Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); *see also Virginia Military Inst.* v. *United States*, 508 U.S. 946 (1993) (Scalia, J., concurring).

Thurber, meanwhile, would have required resolving "a logically antecedent issue * * * regarding whether the particular plan language at issue is sufficient to create a claim for equitable relief at all." U.S. *Thurber* Br. 5. The Solicitor General opined that the plan terms at issue were not sufficient, and that there was no compelling reason for the Court to review the Second Circuit's factbound contrary finding. *Id.* at 15-20. And in her supplemental brief, the plan beneficiary embraced the threshold issue the United States had identified, confirming that the question presented was not necessarily presented after all.

See Petitioner's Supplemental Brief, *Thurber* v. *Aetna Life Ins. Co.*, 2014 WL 2120372, at *6-*11 (May 16, 2014).

Montanile's petition presents neither obstacle. The District Court's order is final; Montanile has been ordered to reimburse the Plan. Pet. App. 44a. And though Montanile argued in the court of appeals that the Plan documents did not create an equitable lien by agreement, *id.* at 11a-17a, his petition affirmatively abandons that claim, Pet. 11 n.4. There is therefore no threshold issue of plan interpretation, as there was in *Thurber*, that would inhibit this Court's review of the dissipation issue.

In short, the petition cleanly presents the question that has divided the circuits, and it does so on a typical set of facts. The petition is therefore an appropriate vehicle for this Court to resolve the split.

2. The question presented also has a tremendous practical impact on ERISA plans and beneficiaries. For large, multi-state plans like the one here, the disagreement among the courts of appeals means that the enforceability of a single plan's reimbursement clause may vary between California and Florida. That is contrary to ERISA's core purpose, which is to "induc[e] employers to offer benefits by assuring a predictable set of liabilities, under uniform standards of primary conduct and a uniform regime of ultimate remedial orders and awards when a violation has occurred." *Rush Prudential HMO, Inc.* v. *Moran*, 536 U.S. 355, 379 (2002). And the "patchwork scheme" of regulation created by the circuit split will "introduce considerable inefficiencies in benefit program operation, which might lead those employers with existing plans to reduce benefits, and those

without such plans to refrain from adopting them." *Fort Halifax Packing Co.* v. *Coyne*, 482 U.S. 1, 11 (1987); *see also Varity Corp.* v. *Howe*, 516 U.S. 489, 497 (1996) (ERISA was meant to "create a system that is [not] so complex that administrative costs, or litigation expenses, unduly discourage employers from offering [ERISA] plans in the first place"). That is harmful to plans and beneficiaries alike.

Permitting the split to linger may also lead to increased rates. Estimates suggest that plans recover more than $1 billion annually under reimbursement provisions. *See* Br. of Amicus Curiae America's Health Ins. Plans, Inc. *et al.* in Support of Respondent, *Sereboff*, No. 05-260, 2006 WL 460877, at *3 n.3. The minority position on dissipation will cost plans a portion of those reimbursements, because beneficiaries in those circuits have every incentive to spend every dollar of settlement funds immediately upon receipt. And that reduction in plan recoveries will have to be passed along to others. As the Eleventh Circuit has explained, where a beneficiary is "relieved of his obligation to reimburse [a plan] for the medical benefits it paid on his behalf, the cost of those benefits [will] be defrayed by other plan members and beneficiaries in the form of higher premium payments." *Zurich Am. Ins. Co.* v. *O'Hara*, 604 F.3d 1232, 1238 (11th Cir. 2010); *see also Cutting* v. *Jerome Foods, Inc.*, 993 F.2d 1293, 1297 (7th Cir. 1993) (Posner, J.) (without reimbursement, a plan member "pays more for the insurance"). A decline in reimbursement affects more than the individual beneficiaries involved in a particular case; it impacts *all* plan beneficiaries.

A significant reduction in reimbursement recoveries could, in fact, cost employees their health insur-

ance: "[E]ach one percent increase in * * * plans' costs * * * results in a potential loss of insurance coverage for about 315,000 individuals." Health Economics Practice, Barents Group, LLC, *Impacts of Four Legislative Provisions on Managed Care Consumers: 1999-2003*, at iii (1998). The Court should not leave in place a split that risks that negative consequence.

Ultimately, plans require certainty going forward. If there is a single, national rule—whatever it is—then plans can price reimbursement or a lack of reimbursement into their rates. What they cannot easily plan for is the current disarray. That is why several industry organizations—the American Council of Life Insurers, America's Health Insurance Plans, The American Benefits Council, and Sun Life Insurance Company of Canada—filed briefs as *amici curiae* in *Bilyeu* asking this Court to resolve the issue. The petition should be granted.

II. THE ELEVENTH CIRCUIT'S DECISION IS CORRECT.

The parties' agreement comes to an end at the merits. This Court should recognize what precedent and historic equity practice confirm: an equitable lien by agreement may be enforced even where the promisor has dissipated the funds subject to the lien. Montanile's contrary view guts the relief this Court held was available in *Sereboff* and *McCutchen*.

1. *Sereboff* refutes Montanile's argument that a beneficiary must possess the identified funds at the time of suit for a plan to enforce its equitable lien by agreement. Under *Sereboff*, the lien attaches " 'as soon as [the beneficiary] gets a title to the thing' "—here, Montanile's settlement from his tortfeasor. 547

U.S. at 364 (citation omitted). At that point, a perfected equitable lien by agreement exists. And *Sereboff* says that the lien remains valid even if the moneys later cannot be traced to " 'some particular funds or assets.' " *Id.* (citation omitted).

That holding forecloses a continual-possession requirement. If the money cannot be traced to a "particular fund or assets," then there is no way the fiduciary could know whether the participant is still in possession of the funds. And yet *Sereboff* holds that the fiduciary can still recover in those circumstances. *Id.* at 365 ("no tracing requirement of the sort asserted by the Sereboffs applies to equitable liens by agreement or assignment"). After *Sereboff*, the focus is not on tracing formalities, but on a pragmatic, three-prong test. Where (1) a beneficiary agreed to repay moneys out of a fund; (2) the fund, and the moneys to be repaid, are specifically identified, and (3) the participant had title to the identified funds, the beneficiary's promise will be enforced in equity. *See id.* at 363-367. Nothing else is required.

Claiming the contrary, Montanile relies (Pet. 17) on this Court's statement that "where 'the property [sought to be recovered] or its proceeds have been dissipated so that no product remains, [the plaintiff's] claim is only that of a general creditor' " and the plaintiff " 'cannot enforce a constructive trust or an equitable lien upon other property of the [defendant].' " *Great-West Life & Annuity Ins. Co.* v. *Knudson*, 534 U.S. 204, 213 214 (2002) (quoting *Restatement of Restitution & Unjust Enrichment* § 215 cmt.a (1936)) (alterations in *Knudson*). As Montanile sees it, *Knudson* establishes a present-possession requirement for all equitable liens, including the Plan's equitable lien by agreement.

But *Sereboff* considered—and disagreed with—that very argument. The Court rejected the Sereboffs' argument that "*Knudson* endorsed application of all the restitutionary conditions—including restitutionary tracing rules—to every action for an equitable lien under § 502(a)(3)." 547 U.S. at 365. The Court also explained that *Knudson* did not "catalog all the circumstances in which equitable liens were available in equity"; "the Court concluded only that equitable restitution was unavailable because the funds sought were not [in the beneficiary's] possession" but had been placed in a trust. *Id.* Indeed, the settlement funds in *Knudson* were *never* in the beneficiary's possession, so the lien never attached to anything held by the beneficiary. *See Knudson*, 534 U.S. at 208 (explaining that the "state court's order provided that the defendants would pay the settlement amount allocated to the Special Needs Trust directly to the trust").

Knudson, in other words, was far more modest than Montanile thinks. All it did was "describe[ ] in general terms the conditions under which a fiduciary might recover when it was seeking equitable restitution." *Sereboff*, 547 U.S. at 365. Equitable restitution and equitable liens by agreement are "different species of relief" with different requirements and incidents. *Id. Knudson* dealt only with equitable restitution, on facts where the beneficiary never had possession of the fund at issue, and *Sereboff* directly addressed equitable liens by agreement. *Sereboff* thus confirms that tracing is not required to enforce an equitable lien by agreement. 547 U.S. at 364.

2. *Sereboff*'s guidance regarding tracing and equitable liens by agreement is in line with historic equity practice. Equitable liens were generally

enforced through foreclosure of the identified property or fund. D. Dobbs, *Law of Remedies* § 1.4 (2d ed. 1993). But a debtor could not defeat the lien by alienating the property or dissipating the fund. As Justice Holmes made clear in a related context, a plaintiff who sought "the recovery of an identified fund" was entitled to equitable relief even if it later turned out that "the fund [was] gone." *Otis* v. *Otis*, 45 N.E. 737, 737 (Mass. 1897). In such circumstances, the court would award "compensation as alternative relief." *Id.*

The Federal Equity Rules this Court promulgated during the days of the divided bench codified this principle. Rule 10 provided that "[i]n suits for the foreclosure of mortgages, or for the enforcement of other liens, a decree may be rendered for any balance found to be due to the plaintiff over and above the proceeds of the sales or sales" of the property that was subject to the lien and "execution may issue for the collection of the same." Fed. Equity R. 10 (1912). Courts recognized that the rule "authorized" equity courts to issue deficiency decrees, *Phelps* v. *Loyhed*, 19 F. Cas. 461, 461 (C.C.D. Minn. 1871) (No. 11,077), and gave plaintiffs an equitable "remedy for the enforcement of existing rights," *Continental-Equitable Title & Trust Co.* v. *National Props. Co.*, 273 F. 967, 970 (D. Del. 1921). Montanile's claim that equity left lienholders without a remedy is contrary to this established practice.

Monetary relief when the property securing a lien had been dissipated was perfectly consistent with broader equitable principles. Equity courts had long awarded compensation "where no such remedy lies at law, * * * in order to prevent irreparable mischief, or to avoid a fraudulent advantage being taken of the

injured party." 2 J. Story, *Commentaries on Equity Jurisprudence* § 798, at 135 (5th ed. 1849). And equitable liens by agreement are particularly well-suited to that mode of enforcement. They are, after all, "merely a means to the end of satisfying a claim for the recovery of money"; the " '*real* remedy, the final object of the proceeding, is the pecuniary recovery.' " *Department of the Army* v. *Blue Fox, Inc.*, 525 U.S. 255, 262-263 (1999) (quoting 1 J. Pomeroy, *Equity Jurisprudence* § 112 (5th ed. 1941)).

All of this points up at a bigger principle: Equity jurisdiction is founded on the maxim that " '[e]quity suffers not a right to be without a remedy.' " *CIGNA Corp.* v. *Amara*, 131 S. Ct. 1866, 1879 (2011) (quoting R. Francis, *Maxims of Equity* 29 (1st Am. ed. 1823)). But that is just what Montanile's position would do; it would leave plans with no way to enforce their otherwise-valid reimbursement provisions when Section 502(a)(3) reflects congressional intent to allow for just such a remedy. That would create perverse incentives for beneficiaries: A beneficiary who honors his legal obligation to reimburse his plan would be *worse off* than a beneficiary who reneges and spends the funds he promised to turn over. Montanile never explains how equity could countenance that truly inequitable result or how it would be in keeping with ERISA's enforcement scheme. This Court, like the Eleventh Circuit below, should reject Montanile's argument on the merits.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN D. KOLB
GIBSON & SHARPS, PSC
9420 Bunsen Parkway
Suite 250
Louisville, KY 40220

NEAL KUMAR KATYAL
Counsel of Record
JESSICA L. ELLSWORTH
MARY HELEN WIMBERLY
SEAN MAROTTA
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
neal.katyal@hoganlovells.com
(202) 637-5600

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Counsel for Respondent